No. 83-1100

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

GARY LEE BATTAGLIA,

Petitioner,

VS.

THE COMMITTEE OF BAR EXAMINERS OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of The State of California

PETITIONER'S REPLY BRIEF

ALVIN H. GOLDSTEIN, JR.
GOLDSTEIN & PHILLIPS
A Professional Corporation
Three Embarcadero Center
Suite 2280
San Francisco, CA 94111
Telephone: (415) 981-8855
Attorneys for Petitioner

PETITIONER'S REPLY BRIEF

Table of Authorities Cited

Cases

IN THE SUPREME COURT OF THE

UNITED STATES

GARY LEE BATTAGLIA,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	NO. 83-1100
THE COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA,	)	
	)	
	)	
Respondent.	)	
	)	

PETITIONER'S REPLY BRIEF

Respondent's assertion that "the Supreme Court of California considers the merits of every petition for review filed by unsuccessful Bar applicants" (Opp.Br., p.14) is meaningless, in the context of the concession that "in arriving at its determination, the Supreme Court may use any or all of the State Bar record." Opp.Br.,p.20; emphasis added. Presumably, this selective approach would permit the

state court to ignore the record completely or to use only that portion supporting the Committee's recommendation. That the record may be "always available" does not satisfy the state court's acknowledged "duty to undertake an independent examination of the evidence in cases of this kind" Siegel v. Bar Examiners, 10 Cal.3d 156,160 (1973), and to resolve all reasonable doubt in an applicant's favor. Id. at 173.

Respondent's suggestion that plenary review is not required as a matter of due process (Opp.Br.,p.20) ignores the fact that substantial and fundamental interests are involved. Respondent's position does not square with decisions of this court, Boddie v. Connecticut, 401 U.S. 371, 375 (1971); Cf. Ortwein v. Schwab, 410 U.S. 656 (1973) ("fundamental interest" found lacking), or decisions of the California Supreme Court in Hall v. Committee of Bar

Examiners, 25 Cal.3d 730,734 (1979); Siegel v. Committee of Bar Examiners, 10 Cal.3d 156,160,173 (1973); Hallinan v. Committee of Bar Examiners, 65 Cal.2d 447,451 (1966).[1/]

It was this Court's certainty that California provided plenary review that inspired Mr. Justice Black to note in Konigsberg v. State Bar of California, 353 U.S. 252,254 (1956), that the California Supreme Court "exercises original

---

1/ Hall: " . . . the independent examination of the record which we must undertake in reviewing a certification denial . . . "

Siegel: "In accordance with our duty to undertake an independent examination of the evidence in cases of this kind, we proceed to a consideration of the record * * * * this court independently examines and weighs the evidence and passes upon its sufficiency. . . . All reasonable doubts are to be resolved in [petitioner's] favor."

Hallinan: " . . . examines and weighs the evidence and passes upon its sufficiency [and that] any reasonable doubts encountered in the making of such an examination should be resolved in favor of the accused."

jurisdiction and is not restricted to the limited review made by an appellate court" and, citing California law, that "its powers in that regard are plenary and its judgment conclusive." (Emphasis added)

Respondent argues that the proceedings before the State Bar Court (an administrative tribunal) and the Committee of Bar Examiners "were actually proceedings before the California Supreme Court" (Opp.Br.,p.20; emphasis added), suggesting that petitioner has already had his day in court. Yet, at page 3 of the brief, respondent asserts that the Committee is "[t]he administrative arm of the California Supreme Court in admissions matters," and concedes that "[t]he actual decision as to whether an applicant is to be admitted is made by the Supreme Court . . . " Opp. Br.,p.20; emphasis added. Thus, judicial review must occur in the California Supreme Court, or not at all.

The assertion that judicial review takes place absent the complete record relied upon by the administrative agency ("In arriving at its determination the Supreme Court may use any or all of the State Bar record." Opp. Br.,p.20), is a view that is not discernible in any of the California cases. The express holding in those cases is to the contrary.

Petitioner is not only denied judicial review, but he is denied meaningful access to the one body that can make an "actual decision," i.e., the California Supreme Court.

Respondent's brief is laden with innuendo suggesting that the California Supreme Court has reviewed the record, e.g., "in the exercise of its judicial discretion following review of the record before it . . . " Opp.Br.,p."i." Yet, a fair reading of respondent's argument justifies the conclusion that petitioner

has not had the benefit of independent judicial review, involving "an examination of the record."

Finally, we address respondent's assertion that the State Bar Court's conclusion and recommendation that petitioner should be admitted forthwith is "reluctant." Opp.Br.,p.18. Nowhere, in the State Bar Court's findings, does the word "reluctant" appear. That is respondent's choice of words and petitioner does not believe that it is a synonym for the phrase used in the State Bar Court findings--i.e., "with considerable difficulty." Supp.App. SBC.Finding 22,p.16. A decision may be reached "with considerable difficulty" that is not "reluctant." There is certainly nothing equivocal about the State Bar Court's conclusion and recommendation that "the applicant should be certified to practice law in the State of California forthwith." (Supp.App. SBC. Findings, p.17)

Respondent seizes upon the phrase "with great difficulty" as if to justify denial of plenary review. This only underscores the need for plenary review. The latent ambiguity of that phrase, as well as the Committee's finding, without specification, that "applicant was less than candid when testifying before the Committee" (Supp.App.CBE.Finding 10,p.5), are appropriate concerns on judicial review.

It is petitioner's contention that the respondent Committee has acted arbitrarily and capriciously and that plenary review by a court will establish that there is no legal basis for refusing petitioner's admission to the Bar. Since, as respondent argues, "the actual decision as to whether an applicant is to be admitted is made by the Supreme Court" (Opp.Br.,p.20; emphasis added) and "Committee decisions are only recommendations" (Ibid), then, as a matter of fundamental fairness, the

"decision" here should only be made by a judicial body after plenary review, i.e., examination of the record, weighing the evidence and resolution of reasonable doubt in favor of the applicant.

That is the process the California Supreme Court says it "must undertake in reviewing a certification denial," and it should do so here.[2/]

[2/] The basic unfairness in not requiring plenary review is illustrated by respondents' opposition which attempts to argue evidence to this court without citation to any record. (Opp.Br.,pp.8-9) The "independent" review required in Bar admission cases cannot be carried out unless the court has the full record before it. Without the record, Committee "findings" cannot be assessed "independently" in accord with any objective standard. The result will be totally subjective, subject to the whim and caprice of a reviewer who may not even be a judge. The one judge summary denial of a petition for review does not mean that the petition has been read by the court.

We ask for nothing more, and we are constitutionally entitled to nothing less.

DATED: February 21, 1984.

Respectfully submitted,

GOLDSTEIN & PHILLIPS

By _____
ALVIN H. GOLDSTEIN, JR.
Attorneys for Petitioner